



6712-01

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1 and 63

#### [IB Docket No. 12-299; FCC 12-125]

Reform of Rules and Policies on Foreign Carrier Entry Into the U.S. Telecommunications Market

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission is proposing to make changes to the criteria under which it considers applications and notifications from foreign carriers or affiliates of foreign carriers for entry into the U.S. market for international telecommunications services and facilities under section 214 of Communications Act of 1934, as amended (the “Act”) and section 2 of the Cable Landing License Act. By this document, the Commission seeks to eliminate outdated or unnecessary rules, simplify rules that it may retain, reduce regulatory costs and burdens imposed on applicants, and improve transparency with respect to filing requirements of the ECO Test. It also seeks to promote competition to achieve greater decisional flexibility in evaluating applications and notifications, and continue to protect important interests related to national security, law enforcement, foreign policy, and trade policy.

**DATES:** Submit comments on or before **[INSERT DATE 30 DAYS AFTER DATE AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and replies on or before **[INSERT DATE 50 DAYS AFTER DATE AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Written comments on the Paperwork Reduction Act (PRA) proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB) and other interested parties on or before **[INSERT DATE 60 DAYS AFTER DATE AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by Docket No. 12-299, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Federal Communications Commission's ECFS Web site: <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail to [FCC504@fcc.gov](mailto:FCC504@fcc.gov), phone: 202-418-0530 (voice), tty: 202-418-0432.

In addition to filing comments as described above, a copy of any comments on the PRA information collection requirements contained herein should be submitted to the FCC via e-mail to [PRA@fcc.gov](mailto:PRA@fcc.gov) and to Nicholas A. Fraser, OMB, via e-mail to [Nicholas\\_A\\_Fraser@omb.eop.gov](mailto:Nicholas_A_Fraser@omb.eop.gov) or via fax at 202-395-5167.

For detailed instructions on submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Jodi Cooper or James Ball, Policy Division, International Bureau, FCC, (202) 418-1460 or via e-mail to [Jodi.Cooper@fcc.gov](mailto:Jodi.Cooper@fcc.gov), [James.Ball@fcc.gov](mailto:James.Ball@fcc.gov). On PRA matters, contact Cathy Williams, Office of the Managing Director, FCC, (202) 418-2918 or via e-mail to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rulemaking in IB Docket No. 12-299, FCC 12-125, adopted on October 10, 2012 and released on October 11, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12<sup>th</sup> Street, S.W.,

Washington, DC 20554. The document also is available for download over the Internet at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db1011/FCC-12-125A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1011/FCC-12-125A1.pdf). The complete text also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), located in Room CY-B402, 445 12<sup>th</sup> Street, S.W., Washington, DC 20554. Customers may contact BCPI at its Web site, <http://www.bcpweb.com>, or call 1-800-378-3160.

### **Comment Filing Procedures**

Pursuant to §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS Web site at <http://efiling.fcc.gov/ecfs2/>.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, D.C. 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, S.W., Washington D.C. 20554.

### **Summary of Notice of Proposed Rulemaking**

1. The Notice of Proposed Rulemaking (NPRM) proposes changes to the criteria that the Federal Communications Commission (FCC) considers in analyzing applications filed by foreign carriers or affiliates of foreign carriers for entry into the U.S. market for international telecommunications services and facilities pursuant to section 214 of the Communications Act of 1934, as amended, and section 2 of the Cable Landing License Act. The Commission seeks comment in the NPRM on proposals to eliminate or, in the alternative, simplify the ECO Test that applies to Commission review of (1) international section 214 applications, (2) cable landing license applications, and (3) notifications of foreign carrier affiliations. The ECO Test is a set of criteria designed to protect the U.S. telecommunications market from potential anticompetitive activities by foreign carriers or their affiliates with market power in their country. The Commission currently applies the ECO Test to applications filed by foreign carriers or their affiliates from countries that are not members of the WTO. The Commission also applies the ECO Test in the context of its rules requiring authorized U.S. international carriers and cable landing licensees to notify the Commission of their foreign carrier affiliations.

2. In the 1995 Foreign Carrier Entry Order, the Commission concluded that the public interest would be served by regulating the entry of foreign carriers or their affiliates into the U.S. market for international telecommunications and facilities under section 214 of the Communications Act. In that proceeding the Commission adopted rules that examined, as one factor in its overall public interest analysis of an application for international section 214

authority, whether “effective competitive opportunities” exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing carrier. The Commission applied the ECO Test only to applications to provide service to foreign points where the affiliated foreign carrier had market power, and the Commission’s analysis did not distinguish between World Trade Organization (WTO) countries and non-WTO Member countries. Although the Foreign Carrier Entry Order did not discuss application of the ECO Test to submarine cable applications, the Commission historically had applied an analysis similar to the section 214 ECO Test analysis on a case-by-case basis under the Cable Landing License Act.

3. The Commission, in its 1997 Foreign Participation Order, replaced the section 214 ECO Test adopted in the Foreign Carrier Entry Order, with an open entry standard for applicants from WTO Member countries. The Commission adopted a rebuttable presumption by which it presumes that foreign investment from WTO Member countries does not pose competitive concerns in the U.S. market. The Commission, however, retained the ECO Test with respect to foreign entrants from non-WTO Member countries, finding that circumstances that existed when it adopted the Foreign Carrier Entry Order had not changed sufficiently with respect to countries that were not members of the WTO, *i.e.*, that non-WTO countries were not liberalized and presented legal and practical barriers to entry. The Commission concluded that its goals of increasing competition in the U.S. telecommunications service market and opening foreign telecommunications service markets would continue to be served by opening the U.S. market to applicants from non-WTO countries where the applicants can demonstrate that there are effective competitive opportunities for U.S. carriers in the foreign country. The Commission did not presume, however, that an application from a carrier in either a WTO or non-WTO country poses no national security, law enforcement, foreign policy or trade policy concerns, and

accords deference to Executive Branch agencies in identifying and interpreting issues of concern related to these matters.

4. ECO Test Criteria for Section 214 Applications and Notifications: The ECO Test that applies to international section 214 authority applications filed by foreign carriers or certain of their affiliates is codified in section 63.18(k) of the Commission's rules. For section 214 applications, the Commission's rules require that a foreign carrier applicant from a non-WTO country must demonstrate: (1) the legal ability of U.S. carriers to enter the foreign market and provide facilities-based and/or resold international services, in particular international message telephone service (IMTS), (2) the existence of reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services or the provision of the relevant resale service, (3) the existence of competitive safeguards in the foreign country to protect against anticompetitive practices, (4) the existence of an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards, and (5) any other factors the applicant deems relevant to the ECO Test demonstration.

5. The Commission also applies the ECO Test in the context of its rules requiring authorized international section 214 carriers to notify the Commission of their foreign carrier affiliations. A U.S. authorized carrier that acquires or seeks to acquire an affiliation with a foreign carrier that is authorized to operate in a non-WTO country that the U.S. carrier is authorized to serve under section 214 must show, under the ECO Test requirements in § 63.18 of the Commission's rules, that its operations on the route for which it proposes to acquire an affiliation with the non-WTO foreign carrier continues to serve the public interest. If the U.S. carrier cannot make this showing, or demonstrate that the foreign carrier lacks market power in

the non-WTO Member country, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate revocation hearing.

6. ECO Test criteria for Submarine Cable Applications and Notifications: The Commission's ECO Test as it applies to applications for submarine cable landing licenses filed by foreign carriers or certain of their affiliates is not codified in the rules. The test is similar, but not identical, to the analysis for international section 214 applications. The Commission examines: (1) the legal, or de jure, ability of U.S.-licensed companies to have ownership interests in submarine cables landing in the foreign market, and (2) if no explicit legal restrictions on ownership exist, the practical, or de facto, ability of U.S.-licensed companies to have ownership interests in cable facilities in the foreign market. The Commission also considers other public interest factors consistent with its discretion under the Cable Landing License Act that may weigh in favor of or against grant of a license, including any national security, law enforcement, foreign policy or trade policy concerns that may be raised by a particular application.

7. In addition, the Commission applies the ECO Text in the context of its rules requiring U.S. authorized cable landing licensees to notify the Commission of their foreign carrier affiliations. Under Commission rules, U.S. cable landing licensees have a continuing obligation to notify the Commission of an affiliation with a foreign carrier authorized to operate in a destination market where the U.S.-licensed cable lands. In certain circumstances, cable landing licensees have an obligation to obtain prior approval before acquiring an affiliation with a foreign carrier authorized to operate in a market where the U.S.-licensed cable lands. That is, the U.S. licensee must demonstrate in its notification either that the foreign carrier lacks market power in that country or that there are effective competitive opportunities for U.S.-licensed companies to land and operate submarine cables in that country. If the licensee is unable to make either showing, then the Commission may impose conditions on the authorization or proceed to an authorization revocation hearing.

8. Re-examining the ECO Test: The Commission now believes it is time to review the requirements of the ECO Test as it applies to section 214 authority applications, cable landing license applications, and foreign carrier affiliation notifications. There are now 156 countries that are Members of the WTO (in addition to the European Union), and 27 observer countries that are in the process of joining, or acceding to, the WTO. While this leaves approximately one-quarter of all countries outside the WTO that have not opened up their markets pursuant to WTO accords, the non-WTO Member countries represent a de minimis fraction, or approximately five percent of the world's gross domestic product. The detailed ECO Test requirements, as initially adopted in the Foreign Carrier Entry Order, were designed to be applied to countries that could support advanced regulatory regimes. Today, the ECO Test applies only to non-WTO Member countries, and these countries are small countries that may not have the necessary resources to support a regulatory framework that meets the detailed ECO Test requirements.

9. The Commission therefore proposes to re-examine current ECO Test requirements to either eliminate the ECO Test or modify ECO Test criteria it uses in review of section 214 applications, cable landing license applications, and foreign carrier affiliation notifications. If the ECO Test is maintained, the Commission proposes to codify that test in its rules governing submarine cable landing license applications. However, whether the ECO Test is eliminated or modified, the Commission proposes to continue to maintain its review of section 214 applications, cable landing license applications, and foreign carrier affiliation notifications under its dominant carrier safeguards and "no special concessions" rules. These rules, according to the Commission in previous rulings, help to prevent certain anticompetitive strategies that foreign carriers can use to discriminate among their U.S. carrier correspondents, such as refusal to interconnect and circuit blocking. Absent these rules, foreign carriers with market power could use their market power to discriminate in favor of certain U.S. carriers, including their own



affiliates. Furthermore, applications for section 214 authority and cable landing licenses, and foreign affiliation notifications, that involve foreign carrier entry or investment will continue to be coordinated with the appropriate Executive Branch agencies, and the Commission will accord deference to their views in matters related to national security, law enforcement, foreign policy, or trade policy that may be raised by a particular transaction.

10. Proposals to Eliminate the ECO Test: The Commission seeks comment on elimination of the ECO Test for section 214 authorizations, cable landing licenses and foreign carrier affiliation notifications. If the ECO Test is eliminated, the Commission would maintain the distinction in its rules between carriers or affiliates from WTO and non-WTO Member countries. Non-WTO applicants for section 214 authorizations would no longer be required to demonstrate compliance with the ECO Test. Instead, the Commission would rely on its authority to analyze potential anticompetitive harm on a case-by-case basis to make a public interest determination as to whether U.S. carriers are experiencing competitive problems in that market, and whether the public interest would be served by authorizing the foreign carrier to enter the U.S. market. The case-by-case analysis would require applicants to submit the information to us required by our rules applicable to section 214 applications and cable landing license applications. The applications would not be eligible for streamlined processing, and the foreign carrier affiliation notifications would continue to be subject to a 45-day notification prior to consummation of the transaction. Existing section 214 carriers and cable landing licensees would still have to provide information showing that it is, or is seeking to become affiliated with, a foreign carrier with market power in a non-WTO country. The Commission could consult with the United States Trade Representative (USTR) and other agencies as to any anticompetitive problems that may exist for U.S. companies in the country of the applicant. U.S. carriers would also have an opportunity to file comments as to whether they have experienced problems in entering the relevant market of a non-WTO country. The Commission would have the flexibility

to request additional information, if needed, which may be similar to the type of information required by the current ECO Test. If the Commission finds that U.S. carriers are experiencing competitive problems in that market, then it would have the flexibility to seek additional information from the applicant relating to U.S. carrier ability to enter the foreign market of the applicant and impose, if necessary, appropriate conditions on the authorization or license.

11. The Commission requests comment on eliminating an ECO Test determination from our rules and policies applicable to U.S.-licensed companies and applicants under section 214 of the Communications Act and under the Cable Landing License Act. Specifically, commenters should address whether the Commission’s dominant carrier safeguards and the “no special concessions” rules provide adequate protection against anti-competitive harm, or whether additional safeguards are necessary to protect U.S. carriers from competitive harm in their provision of U.S. international services and facilities on routes between the United States and non-WTO countries.

12. In proposing elimination of the ECO Test, the Commission seeks comment on to what extent eliminating the ECO Test would reduce costs incurred by carriers by the review of applications involving an ECO Test determination, and whether there may be benefits in retaining the ECO Test criteria that outweigh the costs and burdens associated with it.

13. Alternative Proposal to Modify the Section 214 ECO Test: If the Commission maintains the ECO Test, it seeks comment on ways to simplify and improve its application. First, under a modified approach, the Commission proposes retaining – either in a rule or by application on a case-by-case basis under our broad authority – the first prong of the section 214 ECO Test that requires the Commission to determine whether U.S. carriers have the legal, or de jure, ability to enter the foreign destination market and provide international facilities-based services and/or resold services. The Commission requests commenters to identify and comment on known legal barriers to entry in markets of non-WTO Member countries that may continue to

exist, and more specifically of how laws, regulations, policies, and practices known to commenters prevent U.S. carriers from competing in a particular foreign market should this legal requirement be removed.

14. In modifying the ECO Test, the Commission also proposes to eliminate certain criteria that it considers to determine whether there are practical, or de facto, effective competitive opportunities for U.S. carriers to enter the foreign destination market. Specifically, the Commission proposes to eliminate (1) the requirement that applicants show that there is an effective regulatory framework in the foreign country to develop, implement, and enforce legal requirements, interconnection arrangements and other safeguards, and (2) the requirement that applicants must show whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, with the exception of retaining a competitive safeguard that requires timely and nondiscriminatory disclosure of technical information needed to interconnect with carriers' facilities. Therefore, the Commission would continue to require applicants to show that there are reasonable and nondiscriminatory charges, terms, and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services. The Commission seeks comment on whether there is a practical basis for retaining these requirements based on carriers' experiences interconnecting to a foreign carrier's domestic facilities for termination and origination of international services. Further, the Commission also seeks comment on whether there is a policy basis for retaining current ECO Test criteria that apply to remaining non-WTO markets, and whether fewer criteria or additional criteria are required for either type of authorization.

15. Codification of the Submarine Cable ECO Test: The ECO Test for submarine cable landing licenses is not codified in the Commission's rules. Whether or not the ECO Test is eliminated or modified, the Commission proposes to amend the cable licensing rules to include certifications concerning foreign carrier affiliations in a manner similar to section 214

authorization rules. If the Commission retains the ECO Test, then the Commission proposes to codify in the cable landing license rules an ECO Test that contains criteria similar to the section 214 ECO Test criteria proposed in the alternative rules. Under this approach, the Commission seeks comment on proposed rules that would require applicants from non-WTO countries to demonstrate that U.S. carriers have both the legal, or de jure, and practical, or de facto, ability to own and operate submarine cables in a country where a cable lands. To demonstrate de facto ability, the applicant would have to show that U.S. carriers would have the ability to collocate facilities, provide or obtain backhaul capacity, access technical network information, and interconnect to the public switched telephone network. These proposed rules would also apply to notifications filed by a cable landing licensee that becomes, or seeks to become, affiliated with, a foreign carrier possessing market power in a non-WTO Member country where the cable lands. The Commission seeks comment on these proposals.

16. The Commission also requests comment on the benefits and costs of the current ECO Test with respect to cable landing license applications and notifications. Specifically, is there an incentive for non-WTO countries to open their markets to U.S. carriers under the current test, or are there any other benefits to U.S. carriers in modification of the ECO Test? Conversely, what are the costs an applicant incurs in providing information under the current ECO Test? The Commission encourages commenters to discuss all aspects of this proposal as well as practical problems cable landing license applicants face in complying with the current ECO Test requirements.

#### **Paperwork Reduction Act of 1995 Analyses**

17. This document contains proposed new and modified information collection requirements. The Commission, as a part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork

Reduction Act of 1995 (PRA), Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

18. Written comments by the public on the proposed and/or modified information collections are due **[INSERT DATE 30 DAYS AFTER DATE AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before **[INSERT DATE 60 DAYS AFTER DATE AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. In addition to filing comments with the Secretary, Marlene H. Dortch, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12<sup>th</sup> Street, SW, Washington, DC 20554, or via email to [Judith.BHerman@fcc.gov](mailto:Judith.BHerman@fcc.gov) and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via email to [Kim\\_A\\_Johnson@omb.eop.gov](mailto:Kim_A_Johnson@omb.eop.gov).

#### **Initial Regulatory Flexibility Analysis**

19. Pursuant to the Regulatory Flexibility Act (RFA), the Commission certifies that that an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the proposals considered in this NPRM is not warranted, and that a regulatory flexibility certification is appropriate for the reasons stated below.

20. First, the ECO Test rules that the Commission proposes to either eliminate or modify in this NPRM affect only applications filed by foreign carriers or their affiliates that hold market power in a country that is not a member of the WTO. Based on statistics available, there are currently 156 WTO Member countries (in addition to the European Union), and we calculate, based on 2010 World Bank gross domestic product (GDP) data, that the remaining non-WTO

Member countries represent approximately five percent of the world's GDP. The ECO Test requirements are detailed and were designed to be applied to countries that could support advanced regulatory regimes. Most of the non-WTO Member countries are countries that may not have the necessary resources to support a regulatory framework that meets the ECO Test requirements. In this NPRM the Commission is proposing either to completely eliminate or modify the current ECO Test criteria that will result in lessening the economic impact on applicants from non-WTO Member countries requesting an ECO Test determination.

21. The Commission believes that the proposal and other options on which it seeks comment in this NPRM will reduce costs and burdens currently imposed on applicants, carriers, and licensees, including those that are small entities, and accelerate the authorization and licensing process, while continuing to ensure that the Commission has the information it needs to carry out its statutory duties. Therefore, the Commission certifies that the proposals in this NPRM, if adopted, will not have a significant impact on a substantial number of small entities. The Commission will send a copy of the NPRM, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

### **Ordering Clauses**

22. IT IS ORDERED that, pursuant to sections 1, 2, 4(i) and (j), 201-205, 208, 211, 214, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)-(j), 201-205, 208, 211, 214, 303(r), and 403, and the Cable Landing License Act, 47 U.S.C. 34-39 and Executive Order No. 10530, section 5(a), reprinted as amended in 3 U.S.C. 301, this Notice of Proposed Rulemaking is ADOPTED.

23. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of Small Business Administration.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Cable landing licenses.

47 CFR Part 63

Communications common carriers.

FEDERAL COMMUNICATIONS COMMISSION.

Bulah P. Wheeler  
Associate Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 1 and 63, and propose alternative rules to those parts as follows:

## **PART 1 – PRACTICE AND PROCEDURE**

1. The authority citation for part 1 continues to read as follows:

AUTHORITY: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), and 309.

2. Section 1.767 is amended by revising paragraph (a)(8), adding note to (a)(8)(iv), and revising note to section to read as follows:

### **§ 1.767 Cable Landing Licenses.**

(a) \* \* \*

(8) For each applicant:

(i) The place of organization and the information and certifications required in § 63.18(h) and (o) of this chapter;

(ii) A certification as to whether the applicant is, or is affiliated with, a foreign carrier, including an entity that owns or controls a cable landing station, in any foreign country. The certification shall state with specificity each such country;

(iii) A certification as to whether or not the applicant seeks to land and operate a submarine cable connecting the United States to any country for which any of the following is true. The certification shall state with specificity the foreign carriers and each country:

(A) The applicant is a foreign carrier in that country; or

(B) The applicant controls a foreign carrier in that country; or

(C) Any entity that owns more than 25 percent of the applicant, or that controls the applicant, controls a foreign carrier in that country.



(D) Two or more foreign carriers (or parties that control foreign carriers) own, in the aggregate, more than 25 percent of the applicant and are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of arrangements for the terms of acquisition, sale, lease, transfer and use of capacity on the cable in the United States; and

(iv) For any country that the applicant has listed in response to paragraph (a)(8)(iii) of this section that is not a member of the World Trade Organization, a demonstration as to whether the foreign carrier lacks market power with reference to the criteria in §63.10(a) of this chapter.

NOTE TO PARAGRAPH (a)(8)(iv): Under § 63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

\* \* \* \* \*

NOTE TO § 1.767: The terms “affiliated” and “foreign carrier,” as used in this section, are defined as in § 63.09 of this chapter except that the term “foreign carrier” also shall include any entity that owns or controls a cable landing station in a foreign market. The term “country” as used in this section refers to the foreign points identified in the U.S. Department of State list of Independent States of the World and its list of Dependencies and Areas of Special Sovereignty. See <http://www.state.gov>.

3. Section 1.768 is amended by revising paragraph (g)(2) to read as follows:

**§ 1.768 Notification by and prior approval for submarine cable landing licensees that are or propose to become affiliated with a foreign carrier.**

\* \* \* \* \*

(g) \* \* \*

(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the authorized U.S. licensee must demonstrate that it continues to serve the public interest for it to retain its interest in the cable landing license for that segment of the cable that lands in the non-WTO destination market. Such a showing shall include a demonstration as to whether the foreign carrier lacks market power in the non-WTO destination market with reference to the criteria in § 63.10(a) of this chapter. If the licensee is unable to make the required showing or is notified by the Commission that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules under 47 U.S.C. 34 through 39 and Executive Order No. 10530, dated May 10, 1954, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

NOTE TO PARAGRAPH (g)(2): Under § 63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

\* \* \* \* \*

**PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE,  
REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON  
CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY  
STATUS**

4. The authority citation for part 63 continues to read as follows:

Authority: Sections 1, 4(i), 4(j), 10, 11, 201-205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201-205, 214, 218, 403, and 571, unless otherwise noted.

5. Section 63.11 is amended by revising paragraph (g)(2) to read as follows:

**§ 63.11 Notification by and prior approval for U.S. international carriers that are or propose to become affiliated with a foreign carrier.**

\* \* \* \* \*

(g) \* \* \*

(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the U.S. authorized carrier must demonstrate that it continues to serve the public interest for it to operate on the route for which it proposes to acquire an affiliation with the foreign carrier authorized to operate in the non-WTO Member country. Such a showing shall include a demonstration as to whether the foreign carrier lacks market power in the non-WTO Member country with reference to the criteria in § 63.10(a) of this chapter. If the U.S. authorized carrier is unable to make the required showing in § 63.10(a), the U.S. authorized carrier shall agree to comply with the dominant carrier safeguards contained in section 63.10(c), effective upon the acquisition of the affiliation. If the U.S. authorized carrier is notified by the Commission that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules, then the

Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

NOTE TO PARAGRAPH (g)(2): Under § 63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

\* \* \* \* \*

6. Section 63.18 is amended by revising paragraph (k), removing paragraph (p), redesignating paragraph (q) as (p), and adding new paragraph (q) to read as follows:

**§ 63.18 Contents of applications for international common carriers.**

\* \* \* \* \*

(k) For any country that the applicant has listed in response to paragraph (j) of this section that is not a member of the World Trade Organization, the applicant shall make a demonstration as to whether the foreign carrier has market power, or lacks market power, with reference to the criteria in § 63.10(a) of this chapter.

NOTE TO PARAGRAPH (k): Under § 63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

\* \* \* \* \*

(q) Any other information that may be necessary to enable the Commission to act on the application.

\* \* \* \* \*

## **Alternative Proposed Rules**

### **PART 1 – PRACTICE AND PROCEDURE**

1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), and 309.

2. Section 1.767 is amended by revising paragraph (a)(8) and note to section to read as follows:

#### **§ 1.767 Cable Landing Licenses.**

(a) \* \* \*

(8) For each applicant:

(i) The place of organization and the information and certifications required in § 63.18(h) and (o) of this chapter;

(ii) A certification as to whether the applicant is, or is affiliated with, a foreign carrier, including an entity that owns or controls a cable landing station, in any foreign country. The certification shall state with specificity each such country;

(iii) A certification as to whether or not the applicant seeks to land and operate a submarine cable connecting the United States to any country for which any of the following is true. The certification shall state with specificity the foreign carriers and each country:

(A) The applicant is a foreign carrier in that country; or

(B) The applicant controls a foreign carrier in that country; or

(C) Any entity that owns more than 25 percent of the applicant, or that controls the applicant, controls a foreign carrier in that country.

(D) Two or more foreign carriers (or parties that control foreign carriers) own, in the aggregate, more than 25 percent of the applicant and are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of arrangements for the terms of acquisition, sale, lease, transfer and use of capacity on the cable in the United States; and

(iv) For any country named in response to paragraph (a)(8)(iii) of this section, the applicant shall make one of the following showings:

(A) The named country is a Member of the World Trade Organization; or

(B) The foreign carrier lacks market power in the named country, with reference to the criteria in § 63.10(a) of this chapter; or

(C) The named country provides effective competitive opportunities to U.S. cable landing licensees to have ownership interests in submarine cables that land in that country. An effective competitive opportunities demonstration should address the following factors:

(1) Whether U.S. cable landing licensees have the legal ability to enter the market of the named country and have ownership interests in submarine cables that land in that country;

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions to interconnect a cable in the named country, the ability to collocate facilities, provide or obtain backhaul capacity, and access to timely disclosed technical network information for the purpose of providing services in the market of that country; and

(3) Any other factors the applicant deems relevant to its demonstration.

NOTE TO PARAGRAPH (a)(8)(iv): Under § 63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

\* \* \* \* \*

NOTE TO § 1.767: The terms “affiliated” and “foreign carrier,” as used in this section, are defined as in § 63.09 of this chapter except that the term “foreign carrier” also shall include any entity that owns or controls a cable landing station in a foreign market. The term “country” as used in this section refers to the foreign points identified in the U.S. Department of State list of Independent States of the World and its list of Dependencies and Areas of Special Sovereignty. See <http://www.state.gov>.

3. Section 1.768 is amended by revising paragraph (g)(2) to read as follows:

**§ 1.768 Notification by and prior approval for submarine cable landing licensees that are or propose to become affiliated with a foreign carrier.**

\* \* \* \* \*

(g) \* \* \*

(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the U.S. authorized licensee must demonstrate that it continues to serve the public interest for it to retain its interest in the cable landing license for that segment of the cable that lands in the non-WTO Member country by demonstrating either that the foreign carrier lacks market power in that country, with reference to the criteria in §63.10(a) of this chapter, or that the country offers

effective competitive opportunities to U.S. cable landing licensees to land and operate submarine cables in that country by making the required showing in §1.767(a)(8)(iv)(C). If the licensee is unable to make either required showing or is notified by the Commission that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules under 47 U.S.C. 34 through 39 and Executive Order No. 10530, dated May 10, 1954, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

NOTE TO PARAGRAPH (g)(2): Under §63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

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**PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE ,  
REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON  
CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY  
STATUS**

4. The authority citation for part 63 continues to read as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 10, 11, 201-205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201-205, 214, 218, 403, and 571, unless otherwise noted.



5. Section 63.18 is amended by revising paragraph (k)(3) introductory text, paragraphs (k)(3)(ii) and (iii), removing paragraphs (k)(3)(iv) and (v), and redesignating paragraph (k)(3)(vi) as (iv) to read as follows:

**§ 63.18 Contents of applications for international common carriers.**

\* \* \* \* \*

(k) \* \* \*

(3) The named foreign country provides effective competitive opportunities to U.S. carriers to compete in that country's market for the service that the applicant seeks to provide (facilities-based, resold switched, or resold private line services). An effective competitive opportunities demonstration should address the following factors:

\* \* \* \* \*

(ii) If the applicant seeks to provide resold services, the legal ability of U.S. carriers to enter the foreign market and provide resold international switched services (for switched resale applications) or resold private line services (for private line resale applications);

(iii) Whether there exist reasonable and nondiscriminatory charges, terms and conditions, including timely disclosed technical information, for interconnection to a foreign carrier's domestic facilities for termination and origination of international services or the provision of the relevant resale service; and

(iv) Any other factors the applicant deems relevant to its demonstration.

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